SUPREME COURT, U. S.
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In The

Supreme Court of the United States

October Term, 1974

No. 74-923

MICHAEL FERRARA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To: The Honorable, The Chief Justice of the United States, and the Associate Justices of the United States Supreme Court.

The petitioner, Michael Ferrara, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 27, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is part of the judgment and order; it appears in the Appendix hereto. No opinion was rendered by the District Court for the District of New Jersey.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on November 27, 1974 and is set forth in the Appendix hereto.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

An extension of time within which to file this petition was sought by petitioner pursuant to an application dated December 23, 1974. On December 30, 1974, this Court ordered that the time for filing a petition for writ of certiorari in this case be extended to January 26, 1975.

QUESTION PRESENTED

Whether the conflict among the Circuits over the test for determining whether sufficient independent evidence of a defendant's participation in a conspiracy exists so as to make admissible against that defendant the hearsay declarations of co-conspirators, now requires the Supreme Court to clarify authoritatively this important area of the criminal law.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18, Sections 371, 549 and 659.

STATEMENT OF CASE

Petitioner and five other persons were charged in August, 1973, in a three count indictment. Count one alleged a conspiracy to steal goods moving in interstate and foreign commerce and to remove goods unlawfully from Customs' custody (18 U.S.C. §371); count two charged unlawful possession of goods stolen while moving in interstate and foreign commerce (18 U.S.C. §659); count three charged unlawful removal of goods from Customs' control (18 U.S.C. §549).

Unindicted co-conspirator Louis Gonzalez was the principal witness for the government. His testimony outlined a series of meetings in which Gonzalez and several co-defendants planned to steal a shipment of television sets from the Port Elizabeth pier in New Jersey. The theft was later executed during normal business hours at the pier by one of the co-conspirators driving to the pier and carrying away the goods. Gonzalez gave no direct testimony of participation by petitioner in any of the conspiratorial meetings or acts. He did, however, damagingly testify, over defense objection, as to hearsay declarations by petitioner's co-conspirators about petitioner's participation in the scheme.

Aside from Gonzalez's recitation of co-conspirators' hearsay declarations concerning petitioner, the only other evidence as to petitioner's participation in the conspiracy was circumstantial.

Essentially, this testimony related to allegedly improper processing by petitioner — the only one of the defendants employed at the pier — of two papers presented by the co-conspirator who actually drove the truck that carried away the goods in question. The government contention was that petitioner's processing of these papers permitted the conspirators to remove the goods from the pier and that this evidence constituted sufficient independent evidence of petitioner's participation in the scheme so as to make admissible against petitioner the hearsay declarations of co-conspirators.

In regard to one of these two papers processed by petitioner, the evidence was undisputed that four other pier employees in addition to petitioner processed this same paper and thereby permitted the driver to remove the goods. At no time did the government charge any of these four persons as participants in the scheme. As to the processing of the second paper, the evidence here was conflicting and ambiguous. During trial, the government acknowledged to the court that its evidence regarding petitioner was "not as strong" (A151)* as that against a co-defendant who was acquitted by the jury.

In charging the jury, the trial court instructed that it could find petitioner guilty of the acts charged in the two substantive counts if it found him guilty of the conspiracy charge and if it found that the acts charged in the two substantive counts were committed in furtherance of the conspiracy. Convicted on all three counts, petitioner was sentenced to concurrent prison terms of two years on each count.

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* References marked "A" are to petitioner's appendix filed in the Court of Appeals

REASONS FOR GRANTING THE WRIT

In the Court of Appeals, petitioner argued that there was insufficient evidence of petitioner's participation in the conspiracy to render admissible against him the hearsay declarations by co-conspirators to which petitioner objected. Petitioner argued that the test for determining the sufficiency of the proof *aliunde* was that enunciated by the United States Court of Appeals in *Geaney v. United States*, 417 F.2d 1116 (2nd Cir. 1969), which was the following:

> "The judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom hearsay evidence is offered, by a *fair preponderance of the evidence independent of the hearsay utterances.* If it has, the utterances go to the jury for them to consider along with the other evidence in determining whether they are convinced beyond a reasonable doubt. If it has not, the judge must instruct the jury to disregard the hearsay . . ." (*Id.* at 1120; emphasis added).

Rejecting the Second Circuit's "fair preponderance" test, the Third Circuit, in affirming the petitioner's conviction, reaffirmed an earlier holding in *United States v. DeLazo*, 497 F.2d 1168 (3rd Cir. 1974) that "only slight evidence" of a defendant's participation in a conspiracy is necessary in order to make admissible against him the hearsay declarations of co-conspirators (Appendix, 6a).

Clearly, this "slight evidence" test employed by the Third Circuit conflicts with the "fair preponderance" test used by the Second Circuit in assessing whether the proof *aliunde* of conspiratorial participation renders admissible hearsay declarations of co-conspirators. Petitioner respectfully submits that if the Second Circuit test had been employed in the instant case, the proof *aliunde* would have been deemed insufficient to make admissible against petitioner the co-conspirators' hearsay declarations, and accordingly, his conviction would have been reversed.

This sharp conflict in the application of the basic federal conspiracy law — 18 U.S.C. §371 — justifies this Court's granting the petition for writ of certiorari.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and order of the Court of Appeals for the Third Circuit.

Respectfully submitted,

s/ Frederick P. Hafetz

GOLDMAN & HAFETZ
Attorneys for Petitioner

January 23, 1975

APPENDIX

STATUTES IN QUESTION

§371. Conspiracy to Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§549. Removing Goods From Customs' Custody; Breaking Seals.

Whoever, without authority, affixes or attaches a customs' seal, fastening, or mark, or any seal, fastening, or mark purporting to be a customs' seal, fastening, or mark to any vessel, vehicle, warehouse, or package; or

Whoever, without authority, willfully removes, breaks, injures, or defaces any customs' seal or other fastening or mark placed upon any vessel, vehicle, warehouse, or package containing merchandise or baggage in bond or in customs' custody; or

Statutes In Question

Whoever, maliciously enters any bonded warehouse or any vessel or vehicle laden with or containing bonded merchandise with intent unlawfully to remove therefrom any merchandise or baggage therein, or unlawfully removes any merchandise or baggage in such vessel, vehicle, or bonded warehouse or otherwise in customs' custody or control; or

Whoever receives or transports any merchandise or baggage unlawfully removed from any such vessel, vehicle, or warehouse, knowing the same to have been unlawfully removed —

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

§659. Interstate or Foreign Baggage, Express or Freight; State Prosecutions.

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Statutes In Question

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen —

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

Statutes In Question

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts.

JUDGMENT AND ORDER OF COURT BELOW

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1314

UNITED STATES OF AMERICA

v.

ANTHONY DE FALCO, FRANK BUSCEMI, ALFRED SARACENO, MICHAEL WEINBERG, MICHAEL FERRARA, RICHARD SANDUCCI

Michael Ferrara, a/k/a "Mickie,"

Appellant

(D.C. Crim. No. 521-73)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued November 14, 1974

Before VAN DUSEN, HUNTER and GARTH,
Circuit Judges

Frederick P. Hafetz, Esq., Goldman & Hafetz, New York City, N.Y.,
Attorneys for Appellant

Jonathan L. Goldstein, U.S. Attorney;
William T. Pizzi, Assistant U.S. Attorney;
Attorneys for Appellee

Judgment and Order

JUDGMENT ORDER

After considering the contentions raised by defendant-appellant (1) that there was insufficient evidence of such defendant's participation in the conspiracy, independent of the co-conspirators' hearsay declarations, to allow the aforesaid hearsay declarations into evidence;[1] (2) that there was insufficient evidence to allow the Government's case against such defendant to go to the jury; and (3) that the district court erred in admitting into evidence telephone company records of a call made from such defendant's residence,[2]

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1. We believe that there was sufficient independent evidence of the appellant's participation in the conspiracy for the objected to declarations to be admissible under the co-conspirator exception to the hearsay rule. See *United States v. DeLazo*, 497 F.2d 1168 (3d Cir. 1974) (only slight evidence required to connect the defendant with a conspiracy once the existence of the conspiracy is proven). In particular, the Government supplied abundant evidence that the theft was accomplished by the efforts of a number of people, working in concert to frustrate the complex system of cargo protection at the depot. The Government also demonstrated that the appellant, as a delivery clerk, was in a strategic position where he could have foiled, but instead facilitated, the scheme. This evidence provided the necessary foundation *aliunde* for application of the co-conspirator rule.

Also, the court finds that many of the declarations testified to by Gonzalez, including the phone call received at the Lamppost Lounge, were not hearsay under the principles adopted by this circuit in *United States v. Mesarosh*, 223 F.2d 449, 454-55 (3d Cir. 1955).

2. Telephone company records of the appellant were relevant to his association with the conspirators who had met at the Lamppost Lounge the night that the records indicated the appellant had called there. The records were properly admitted as business records. 28 U.S.C. §1732.

Judgment and Order

It is ADJUDGED AND ORDERED that the judgment of the district court be and hereby is affirmed.

BY THE COURT: -

Circuit Judge

Dated: November 27, 1974

Attest:

Chief Deputy Clerk